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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/720,947	11/24/2003	Brian L. McMurray	7373-004	5270

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EXAMINER
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PIZIALI, ANDREW T

ART UNIT	PAPER NUMBER
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1771

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/12/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

Application No.

10/720,947

Applicant(s)

MCMURRAY, BRIAN L.

Examiner

Andrew T. Piziali

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 18 December 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3-13,15-20 and 22-43 is/are pending in the application.
- 4a) Of the above claim(s) 3,10,11,16,18-20,23-33 and 41-43 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,4-9,12,13,15,17,22 and 34-40 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 24 November 2003 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application
- ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/3/2006 has been entered.

### ***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 8, 13 and 15 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. The phrase "and the like" renders the claim indefinite because the claim includes elements not actually disclosed (those encompassed by "and the like"), thereby rendering the scope of the claim unascertainable. See MPEP § 2173.05(d).

### ***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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5. Claims 1, 4, 5, 12, 13, 15, 22 and 34-40 are rejected under 35 U.S.C. 103(a) as being unpatentable over USPN 3,041,861 to Kasey in view of USPN 4,879,169 to Zafiroglu in view of Applicant's Disclosure.

Regarding claims 1, 4, 5, 12, 13, 15, 22 and 34-40, Kasey discloses a multi-directional fabric comprising a two-sided single layer warp knit fabric comprising a first side formed by stitches of a first yarn and a second side formed by stitches of a second yarn, that are integrally formed using at least two guide bars, such that the first and second sides have at least one different quality (differential shrinkage) from the other side, thereby providing a multi-directional performance fabric for use alone or as an article including the fabric (see entire document including column 1, lines 32-44, column 2, lines 7-67, and column 3, lines 3-19).

Kasey discloses that any shrinkable yarn may be used (column 2, lines 7-36) to produce products that conventionally comprise elastic material (column 3, lines 60-64), but Kasey does not appear to specifically mention the use of spandex yarn. Zafiroglu discloses that it is known in the knit fabric art to use spandex yarn and that spandex is known to shrink (see entire document including column 2, lines 35-43 of Zafiroglu). It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the yarn from any suitable shrinkable yarn material, such as spandex, because spandex is conventionally used in products such as undergarment fabrics and because it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability and desired characteristics.

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Kasey discloses that the fabric may be prepared using any standard knitting machine (column 3, lines 2-19), but Kasey does not appear to specifically mention a stitch evasion technique. The current specification discloses that the stitch evasion technique is known to one skilled in the art of warp knitting (page 23, lines 16-18). Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to make the knit fabric from any suitable knitting technique, such as stitch evasion, because it is within the general skill of a worker in the art to select a known knitting technique on the basis of its suitability and desired characteristics.

Regarding claims 4 and 5, Kasey discloses that three guide bars may be used (column 3, lines 3-19).

Regarding claim 12, Kasey discloses that the fabric may include fibers of polyester, cotton, or wool (column 2, lines 7-36).

Regarding claim 13, Kasey discloses that the fabric may include spun staple fibers, multifilament fibers, or combinations thereof (column 2, lines 7-10).

Regarding claim 22, Kasey discloses that the differential shrinkage yarns may provide for 100% quality unique to each side (column 2, lines 45-48).

Regarding claim 34, Kasey discloses that the fabric may have a weight of 3.37 oz/yd<sup>2</sup> (considered to be about 4 oz/yd<sup>2</sup>) (see Examples).

Regarding claim 35, Kasey discloses that the fiber components forming the fabric may have a weight of 40 denier (see Examples).

Regarding claims 37-40, Kasey discloses that the fabric may be used to make an article such as slips, gowns, lingerie, dresses, blouses, and outer-wear fabrics (column 3, lines 60-64).

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6. Claims 6-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over USPN 3,041,861 to Kasey in view of USPN 4,879,169 to Zafiroglu in view of Applicant's Disclosure as applied to claims 1, 4, 5, 12, 13, 15, 22 and 34-40 above, and further in view of anyone of USPN 4,574,397 to Dennard or USPN 5,123,117 to Prendergast.

Regarding claims 6-9, Kasey does not appear to specifically disclose that the at least one different quality between fabric sides may include a color difference, but Kasey does disclose that the fabric may be used to produce outer-wear (column 3, lines 60-64). Dennard and Prendergast each disclose that it is known in the outerwear fabric art to use different colors for the two sides of a jacket fabric so that the jacket provides different colors when reversed (see entire document including column 1, lines 18-45 of Dennard and column 1, lines 6-68 of Prendergast). It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the at least one different quality include a color and/or shade difference, because the different colors and/or shades would allow for a different color and/or shade garment when reversed and because it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability and desired characteristics.

Regarding claims 7 and 8, Dennard and Prendergast are silent with regards to specific methods of varying the color of the fibers, therefore, it would have been obvious to look to the prior art for conventional methods. The examiner takes Official Notice that dyeing is a well-known method of changing the color of fibers. It would have been obvious to one having ordinary skill in the art at the time the invention was made to make the fabric sides possess

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different colors by dying the sides different colors, motivated by the expectation of successfully practicing the invention of Kasey.

Regarding claim 8, it is the examiner's position that the article taught or suggested by the applied prior art is identical to or only slightly different than the claimed article. Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 227 USPQ 964, 966 (Fed. Cir. 1985). The burden has been shifted to the applicant to show obvious difference between the claimed product and the prior art product. *In re Marosi*, 218 USPQ 289 (Fed. Cir. 1983). The applied prior art either anticipated or strongly suggested the claimed subject matter. It is noted that if the applicant intends to rely on Examples in the specification or in a submitted declaration to show non-obviousness, the applicant should clearly state how the Examples of the present invention are commensurate in scope with the claims and how the Comparative Examples are commensurate in scope with the applied prior art.

7. Claim 17 is rejected under 35 U.S.C. 103(a) as being unpatentable over USPN 3,041,861 to Kasey in view of USPN 4,879,169 to Zafiroglu in view of Applicant's Disclosure as applied to claims 1, 4, 5, 12, 13, 15, 22 and 34-40 above, and further in view of USPN 5,916,273 to Hepfinger.

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Kasey does not appear to specifically mention the use of microdenier fibers, but Hepfinger discloses that it is known in the knitted fabric art to use microdenier fibers for a variety of reasons, including to enhance the feel and softness of the fabric (see entire document including column 1, lines 4-9 and column 4, lines 5-25). It would have been obvious to one having ordinary skill in the art at the time the invention was made to include microdenier fibers, because microdenier fibers enhance the feel and softness of the fabric and because it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability and desired characteristics.

### ***Response to Arguments***

8. Applicant's arguments filed 11/3/2006 have been fully considered but they are not persuasive.

The applicant asserts that there is no motivation to combine Kasey with Zafiroglu because Kasey allegedly requires rigid yarns. The examiner respectfully agrees. Kasey discloses that the fabrics of the invention may be used to produce slips, gowns, lingerie, and other undergarment fabrics as well as dresses, blouses, and outer-wear fabrics (column 3, lines 60-64).

The applicant asserts that Kasey requires an open construction but that the use of elastic yarns would necessarily result in a closed construction. The examiner respectfully disagrees. USPN 5,052,084 to Braun discloses that elastic strands may be used to create open constructions (column 1, lines 60-68), in particular, knitted open constructions (column 3, lines 7-13).



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***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andrew T. Piziali whose telephone number is (571) 272-1541. The examiner can normally be reached on Monday-Friday (8:00-4:30).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on (571) 272-1478. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

atp

 1/17/07

ANDREW PIZIALI  
PRIMARY EXAMINER